

STATE OF MICHIGAN
IN THE SUPREME COURT

MILDRED L. LAWRENCE, Personal
Representative of the Estate of LLOYD C.
GINGER, Deceased

Plaintiff-Appellee

Supreme Court No.: 122215
Court of Appeals No.: 224874
Lower Court No.: 98-973-NG

v

BATTLE CREEK HEALTH SYSTEMS,
a Michigan hospital organization,

Defendant-Appellant

REPLY BRIEF BY DEFENDANT-APPELLANT

Submitted by:

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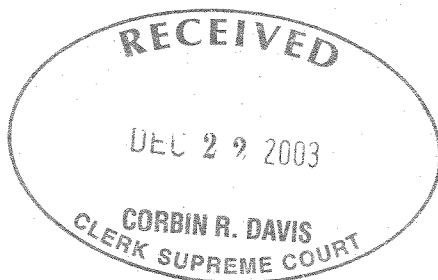


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ARGUMENT

ISSUE I.

Three topics will be addressed under Issue I. They include Plaintiff's mis-analysis of applicable case law, Plaintiff's assertion that malpractice should not apply as no professional relationship existed, and Plaintiff's claim that the jury verdict should not have requested allocation of fault between the two allegedly negligent agents of Defendant-Appellant.

Plaintiff's Case Law Analysis

Plaintiff's analysis of applicable case law is flawed in five particulars. The interpretation of Dorris v Detroit Osteopathic Hospital, 460 Mich 26; 594 NW2d 455 (1999) is improperly narrow and restrictive. Plaintiff's dismissal of Regalski v Cardiology Associates, P.C., 459 Mich 891; 587 NW2d 502 (1998) as inapplicable depends upon a misleading interpretation of that decision. Plaintiff fails to accurately represent the emphasis in earlier decisions upon a professional relationship. The cases involving a fall in a hospital which are relied upon by Plaintiff are distinguishable from Dorris, Regalski and the present matter. Plaintiff's reference to, and reliance upon, case law analysis in the brief filed by Plaintiff-Appellee in the companion case is unpersuasive and, in fact, also provides support for the defense position.

First, Plaintiff asserts (pp. 8-9) that Dorris stands for the rule that the only consideration in distinguishing malpractice and ordinary negligence is whether the issues are within the common knowledge and experience of a jury. This is accomplished by quoting one paragraph from the opinion, while ignoring the immediately preceding paragraph. The defense brief quoted the language in full at page 22, as follows:

The key to a medical malpractice claim is whether it is alleged that the negligence occurred within the course of a professional relationship. The providing of professional medical care and treatment by a hospital includes supervision of staff physicians and decisions regarding selection and retention of medical staff.
(Citation omitted.)

The determination whether a claim will be held to the standards of proof and procedural requirements of a medical malpractice claim as opposed to an ordinary negligence claim depends on whether the facts allegedly raise issues that are within the common knowledge and experience of the jury or, alternatively, raise questions involving medical judgment. Dorris, *supra* at 45-46.

The first paragraph requires consideration of whether the events occurred within the course of a professional relationship. That factor is certainly satisfied by the situation presented herein. The second sentence notes that supervision of treatment providers and selection of medical staff come within the umbrella of professional negligence. Again, the facts in this case present similarities, particularly as to the supervisor who was accused of negligence although not directly involved in assisting the patient when he fell.

Plaintiff's assertion that Regalski is inapplicable (see pp 26-29) is also dependent upon a misrepresentation. Plaintiff argues that the case involved only a statute of limitations issue. While, in the technical sense, the decision did address a limitations period, it did so in the context of determining whether it should be the malpractice or the ordinary negligence period based upon the nature of the claim. It is disingenuous to suggest that the question in Regalski was anything other than whether the facts before the Court involved malpractice or ordinary negligence.

Plaintiff also misrepresents Regalski by leaving out a key sentence in the decision. At page 27, Plaintiff quotes a single sentence, and then cavalierly concludes that "Reglaski is a statute of limitations case." Plaintiff fails to quote the immediately preceding sentence, which explains that the Plaintiff **"was injured because the defendant's technician was negligent in assisting the patient's movement out of a wheelchair and onto the examination table where the technician then performed the cardiac test for which the defendant had been consulted."** The Court then held that this charge sounded in malpractice. It is disingenuous at

best to suggest that the opinion, which first described strikingly similar facts and then characterized those facts as malpractice, is not applicable to the present case.

Two further observations demonstrate that the language from Dorris regarding “the course of a professional relationship” is compatible with, and should be read in conjunction with, the statement from Regalski that the technician was “engaging in or otherwise assisting in medical care and treatment”. First, Regalski was issued in 1998, and was still fresh in the minds of the members of this Court when Dorris was issued a year later. Nothing in the latter decision can be read to contradict, limit or modify, or to even question, the earlier holding in Regalski. Second, the Court of Appeals subsequently read the two decisions in tandem, when it decided Wiley v Henry Ford Cottage Hospital, 257 Mich App 588; 668 NW2d 488 (2003). Alleged negligence while transferring a patient from a wheelchair to a toilet was held to sound in malpractice. The Court noted that the technician was “engaging in or otherwise assisting in medical care and treatment.” Id at 510. “On the basis of Doris (sic), supra, and Regalski, supra, we find that plaintiff’s claim was of medical malpractice because an ordinary layman lacks knowledge regarding the appropriate methods and techniques for transferring patients. Reading the claim as a whole, it is clear that plaintiff’s claim against defendant sounded in medical malpractice.” Id.

In discussing earlier cases, Plaintiff argues (p. 8) that medical malpractice was not defined by the Revised Judicature Act, and cites to Kambas v St. Joseph Mercy Hospital of Detroit, 389 Mich 249, 253-254; 205 NW2d 431 (1973) as well as Sam v Balardo, 411 Mich 405, 419-424; 308 NW2d 142 (1981). Both decisions are enlightening in their own right in terms of defining malpractice. In the former, this Court cited with approval from an Ohio decision:

Malpractice in relation to the care of the human body has been defined as the failure of a member of the medical profession, employed to treat a case professionally, to fulfill the duty, which the law implies from the employment, to

exercise that degree of skill, care and diligence exercised by members of the same profession, practicing in the same or a similar locality, in the light of the present state of medical science. (Citation omitted.) Kambas, *supra* at 254-255.

In the latter case, this Court, when considering a legal malpractice claim, noted that the word “has long been used to describe an attorney’s misfeasance or nonfeasance of professional duty. This was ordinary usage of common law.” Sam, *supra* at 308 NW2d 150. Justice Levin, in his dissent, noted that it was clear “that the general meaning of malpractice is negligent or otherwise wrongful conduct in the practice of a profession” (*Id* at 159).

The next comment regarding Plaintiff’s case law analysis is that reliance upon other cases involving a fall in a hospital is inapposite. First, Plaintiff asserts that all of the fall cases mitigate in her favor. Regalski is clearly a fall case, and does not support Plaintiff. The same can be said about Wiley. While Plaintiff relies upon two cases from the 60’s and a federal district judge’s opinion, recent Michigan cases which are directly on point favor the defense.

It may be that there is a factual distinction between the ordinary negligence cases involving a fall, and those which are labeled as malpractice. The ordinary fall cases (Fogel v Sinai Hospital, 2 Mich App 99; 138 NW2d 503 (1965); Gold v Sinai Hospital, 5 Mich App 368; 146 NW2d 723 (1966) and McLeod v Plymouth Court Nursing Home, 953 F Supp 113 (ED Mich 1997)) involve routine movement in and around a hospital. Conversely, in Regalski the fall occurred while assisting a patient at the beginning of a medical procedure. Similarly, the case before this Court presents a fall which occurred during the completion of a medical procedure. Although there may be no clear distinction, there does appear to be a sense that, in Fogel and Gold, ordinary negligence was found because the patient was simply moving from one location to another. On the other hand, those cases which involved assisting a patient in transferring or changing position during a procedure found the events to sound in malpractice. The present matter more closely resembles the latter.

The last observation under the case law analysis relates to reliance by Plaintiff herein (see p 29) upon analysis drafted by the plaintiff in the companion case, Bryante v Oak Pointe Villa, #121723. Plaintiff in Bryant argues, at page 24, that this Court’s decision in Regalski is “extremely difficult to understand.” The decision is only difficult to understand if you accept Plaintiff’s analysis. Plaintiff asserts that the reference in Regalski to “engaging in or otherwise assisting in medical care and treatment” adds an element of confusion and should be discarded. On the contrary, that language, read in conjunction with this Court’s decision in Dorris as well as the terms of MCL §600.5838a, provides a more accurate definition of malpractice, which encompasses the spirit of prior decisions instead of a single sentence from Dorris.

Perhaps unwittingly, plaintiff’s counsel may, in Bryant, have provided one key to understanding how Regalski and Dorris should be read in harmony, rather than as inconsistent as Plaintiff argues herein. Plaintiff in Bryant argues (pp 26-27) that “custodial” care should be distinguished from medical treatment. Plaintiff argues that the garden variety slip and fall case in a hospital is treated as ordinary negligence because it relates to providing a safe, accident-free environment. This is entirely consistent with Dorris and Regalski, which indicate that, if an event occurs within the course of a medical treatment procedure, that event arises out of the professional relationship and sounds in malpractice. On the other hand, an event which does not relate to a specific medical procedure can more easily be seen as involving custodial care and shelter rather than a professional treatment relationship.

Plaintiff’s Professional Relationship Argument

The second broad topic under Issue I is found at pages 14-16 of Plaintiff’s Brief on Appeal. Plaintiff acknowledges that “one of the central requirements of an action based on medical malpractice is whether ‘the negligence occurred within the course of a professional relationship.’” However, Plaintiff then argues that neither Ms. Kever nor Mr. Horton fall within

the definition of a health professional, and therefore claims against them are not covered by malpractice legislation. One need not look far to find the error in this analysis, and indeed it is found at page 26 of Plaintiff's Brief. Plaintiff quotes Regalski Regalski for the proposition that "the Legislature has extended the shortened two-year period to claims based on the medical malpractice of 'an employee or agent of a licensed health facility or agency who is engaging in or otherwise assisting in medical care and treatment,' as well as that of a licensed health care professional. See MCL §600.5838a(1)." Reglaski, *supra* at 891.

Another relevant decision by this Court is Cox v Board of Hospital Managers, 467 Mich 1; 651 NW2d 356 (2002). The Court restated the principle that "crucial to any medical malpractice claim 'is whether it is alleged that the negligence occurred within the course of a professional relationship.'" Id at 10, quoting Dorris, *supra* at 45. A medical malpractice claim against a hospital or other institution cannot simply generically allege negligence on the part of a unit of the hospital, and it is improper to allow "the jury to find defendant vicariously liable without specifying which employee or agent had caused the injury by breaching the applicable standard of care." Id at 12-13.

Plaintiff's Challenge to the Form of the Verdict

The third topic under Issue I is Plaintiff's assertion that the jury verdict should not have distinguished Ms. Kever and Mr. Horton in the first place. Two problems with this argument are apparent. First, although Plaintiff did object at the trial court level, the issue was not preserved before the Court of Appeals. Additionally, it was never the subject of either the Application for Leave to this Court nor any cross-appeal by the Plaintiff. MCR 7.302(F)(4)(a) clearly prevents this, limiting the issues on appeal to those "raised in the application for leave to appeal."

Second, Plaintiff's argument lacks merit and, in fact, directly contradicts this Court's decision in Cox, *supra*. Although that decision involved a case which was specifically

determined to sound in malpractice, and Plaintiff may therefore assert that it is inapplicable, it also considered claims for vicarious liability against a hospital, analysis which is directly on point. The plaintiff in Cox had generally asserted negligence against the neonatal care unit of a hospital, without specifying the individual negligent actors. The Court noted that a hospital “can be held vicariously liable for the negligence of its employees and agents only.” The “unit” was “not mere shorthand for the individuals in that unit; rather, plaintiffs must prove the negligence of at least one agent of the hospital to give rise to vicarious liability.” Id at 12-13.

Instructing the jury that it must only find the “unit” negligent relieves plaintiffs of their burden of proof. Such an instruction allows the jury to find defendant vicariously liable without specifying which employee or agent had caused the injury by breaching the applicable standard of care. Id.

The Court added, at note 12:

Contrary to the dissent’s assertions, our holding does not increase plaintiffs’ burden or insulate defendants from liability. Rather, our holding merely requires plaintiffs to establish which agent committed the negligence for which the principal is liable as required by agency principles and medical malpractice law. . . . Further, the dissent cites no authority for its assertion that plaintiffs who are unable to establish which professional is negligent are somehow relieved of the requirement of proving a violation of the relevant standard of care by the particular agent for whom the hospital is to be held vicariously liable. No principle of law provides that plaintiffs are required to prove every element of their case unless it is “too difficult” to do so. Id at note 12.

* * * *

We hold that, in order to find the hospital liable on a vicarious liability theory, the jury must be instructed regarding the specific agents against whom negligence is alleged and the standard of care applicable to each agent. As stated above, a hospital’s vicarious liability arises because the hospital is held to have done what its agents have done. Here, the general “unit” instruction failed to specify which agents were involved or differentiate between the varying standards of care applicable to those agents. The instruction effectively relieved plaintiffs of their burden of proof and was not specific enough to allow the jury to “decided the case intelligently, fairly, and impartially.” (Citation omitted.) Under these circumstances, failure to reverse would be inconsistent with substantial justice. Id at 17.

Under the clear holding of Cox, failure to instruct the jury to differentiate between Ms. Kever and Mr. Horton would have been reversible error. The jury verdict was properly crafted, and Plaintiff's untimely argument lacks merit.

ISSUE II.

Plaintiff's analysis of the argument that the ordinary negligence jury instruction should have been tailored to the situation is deserving of three relatively brief comments. First, the issue is not simply a "repackaged formulation" of the malpractice/ordinary negligence argument, as Plaintiff asserts at page 37 of her Brief. Rather, the issue presented such a close call that a modified instruction was necessary (but still inadequate). The present case presents a legitimate dispute as to whether malpractice or ordinary negligence rules should apply. In light of all of the case law cited by the parties in developing the issue, there is a valid argument that these events sound in malpractice. The argument is particularly applicable to Mr. Horton, who was held to an ordinary negligence standard although his only possible involvement came from his role as supervisor during a medical procedure. Under the circumstances, even if it was proper to allow the case to go to the jury on an ordinary negligence theory, it was significantly prejudicial to use the standard ordinary negligence instruction without tailoring it to the supervisory position which Mr. Horton held at all pertinent times.

Defendant was not the only party to request a special jury instruction. Plaintiff's request was granted, and the jury, after being given the instruction on negligence of an adult, was advised:

Ladies and Gentlemen of the Jury, I further instruction you that under our law corporations are liable for the negligence of their employees and hospitals are liable for want of ordinary care toward their patients.

A patient in a private hospital is entitled to reasonable care and attention from authorities and employees, and the nature of such care will depend upon attendant circumstances including the known physical and mental condition of the patient. A proper standard of care expected of a hospital staff toward patients is

such reasonable care and attention for their safety as their mental and physical condition may require. (Transcript, pp 368-369; Supplemental Appendix., pp A-286-287.)

By the above instruction, the jury was told to look at the case from the perspective of a hospital, in light of the medical condition of the patient involved. In this context, it becomes even more essential to also instruct the jury that the hospital employees should be held to the standard applicable to similarly trained employees in light of the patient's medical condition.

Finally, Plaintiff argues that specifically tailored instruction would actually impose a higher standard of care, and would make it even easier for the jury to find negligence. This is not a valid objection. Defendant requested an instruction that was more accurate. It is a red herring to discuss whether the standard of care would have been more or less demanding. The issue is whether the jury was accurately instructed regarding the applicable standard. A general negligence instruction failed to do so, particularly when given with other instructions discussing the standard of care in terms of the known mental and physical condition of the patient.

ISSUE III.

Issue III addresses the discrepancy between the proofs necessary to support the jury verdict and the proofs actually presented herein. Plaintiff argues that the "issue contains only somewhat muddled arguments" (p 41) and "some amount of guesswork" is necessary. In the interest of clarity, the argument is offered in five simple statements, as follows:

- Plaintiff must prove all of the elements of a negligence action.
- Plaintiff's proofs herein did not specify a specific duty or breach thereof, nor did they demonstrate the type of event which only occurs as a result of negligence.
- The verdict is against the great weight of the evidence as the jury found a breach of duty on the party of Ms. Kever when no specific duty or breach was identified, and the events were not the type that could satisfy the elements of a *res ipsa loquitor* action.

- Particularly as to Mr. Horton, under an ordinary negligence theory the verdict was not only unsupported by the evidence but logically inconsistent with the evidence.
- The only way to reconcile the facts with the verdict is to impose a professional responsibility upon Mr. Horton, for his role in supervising a procedure which he himself did not actively participate in.

The contrast between the evidence presented and the jury verdict only serves to highlight the fact that this case, as presented to and considered by the jurors, involved a heightened duty or professional responsibility on the part of the hospital personnel, particularly the supervisor. A verdict which held the active participant to be non-negligent while finding the instructor to be 100% negligent, is directly at odds with the Plaintiff's claim that any average juror could have stepped into Ms. Kever's shoes, and helped Mr. Ginger down from the table without advice or instruction from a supervisor. If Ms. Kever was performing an act subject to an ordinary negligence standard, Mr. Horton cannot be implicated, and yet was.

Based upon the above analysis, Defendant renews its request for relief as set forth in its Brief on Appeal.

Respectfully submitted,

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